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below captioned Adversary Proceeding.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re:

RACHAEL EARL,

Debtor

RACHAEL EARL AND DAN EARL,
husband and wife,

Plaintiffs

DIANE M. MANN, as Chapter 7 Trustee,
Defendant.

Case No.: 2:13-18751-EPB

Adv. No. 2:15-ap-00559-EPB

**PLAINTIFFS RESPONSE TO AND
MOTION TO DENY
DEFENDANT'S MOTIN TO
DISMISS**

Oral Argument Requested

**Honorable Eddward P. Ballinger,
Jr.**

Debtor, Rachael Earl and Non- Debtor Spouse, Dan Earl, (collectively
"Plaintiffs"), by and through undersigned counsel, hereby respond to Defendant's Motion
to Dismiss Adversary Complaint ("Motion") (Doc. 31) The court should deny Motion
because Plaintiffs have plead sufficient facts to sustain their claims for an equitable lien
and unjust enrichment. Defendants seek dismissal based on the third cause of action – for

1 administrative expenses -which was voluntarily dismissed by Plaintiffs and no longer a
2 claim in this adversary proceeding. Further, the court should strike the Motion from the
3 record and not consider it because Defendants have already filed an answer. A Motion to
4 Dismiss at this point is prohibited and a waste of judicial resources.
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6 Finally, Plaintiffs request the court grant leave to amend the complaint should the
7 court determine the factual basis for the claims are not sufficient. This motion is
8 supported by the attached Memorandum of Points and Authorities.
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11 DATED this 5th day of January, 2018
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15 By /s/ Monique Wilhite
16 Monique Wilhite
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22 MEMORANDUM OF POINTS AND AUTHORITIES

24 I. LEGAL STANDARD

25 When considering whether to grant a motion to dismiss, the court must accept all
26 allegations of material fact as true and they must be construed in the light most favorable
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1 to plaintiff. Fed. R. Civ. P. 12(b)(6); *SmileCare Dental Grp. v. Delta Dental Plan of*
2 *California, Inc.*, 88 F.3d 780, 782-83 (9th Cir. 1996)

3 When reviewing the motion, the court can determine whether any legal conclusions
4 drawn in a complaint are supported by factual allegations; and when there are “well-
5 pleaded factual allegations, a court should assume their veracity and then determine
6 whether they plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S.
7 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). *See also, Corvello v. Wells*
8 *Fargo Bank, N.A.*, 728 F.3d 878, 884-885 (9th Cir. 2013)(the court must assume the
9 allegations in the complaint are true, and refuse to consider contradictory “facts” argued
10 by the bank, as “such a defense ‘presents a factual dispute that cannot be resolved [at the
11 motion to dismiss stage].’”). “A complaint should not be dismissed unless it appears
12 beyond doubt that plaintiff can prove no set of facts in support of his claim which would
13 entitle him to relief.” *SmileCare Dental*, 88 F.3d at 783.

14 A sufficient complaint “simply calls for enough fact to raise a reasonable
15 expectation that discovery will reveal evidence [to support the claim] and “enough heft to
16 “sho[w] that the pleader is entitled to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
17 557, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007). *See also* Fed. R. Civ. P. 8(a)(2).

18 The bankruptcy court must follow state law. *See, West v. American Tel. & Tel.*
19 *Co.*, 311 U.S. 223, 236-37, 61 S.Ct. 179 (1940).

20 Plaintiffs have presented the Court with sufficient facts that support valid claims
21 under Arizona law, with “enough heft” to show they are entitled to relief.

22 23 **II. ARGUMENT**

24 As an initial matter, Plaintiffs assert that the Motion to Dismiss is inappropriate as
25 Defendants have already answered the complaint (Doc.10) Rule 12(b)6 of the Federal
26 Rules of Civil Procedure provides that “[a] motion asserting any of these defenses [12(b)
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1 1-7] must be made before pleading if a responsive pleading is allowed.” Rule 12(b) Fed.
2 R. Civ. P.

3 Additionally, Plaintiffs requested that this matter be stayed pending the resolution
4 of the 9th Circuit Appeal (Doc, 30). The court has not ruled on that motion. Although the
5 9th Circuit as made a decision on the appeal against Plaintiffs, the decision is not final and
6 Plaintiffs intend to file a Motion to Reconsider, which is due January 12, 2018.

7 In the event this Court entertains Defendant’s Motion, Plaintiffs offer the
8 following response without waiving the above argument under Rule 12(b)6.

9
10 **A. PLAINTIFFS HAVE PLEAD FACTS THAT SUPPORT A CLAIM FOR**
11 **AN EQUITABLE LIEN**

12 Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do
13 justice and is not bound by strict common law rules or the absence of precedents.
14 It looks to the substance rather than the form. It will not sanction an unconscionable
15 result merely because it may have been brought about by means which simulate
legality. And once rightfully possessed of a case it will not relinquish it short of
doing complete justice.

16 *Sanders v. Folsom*, 104 Ariz. 283, 289, 451 P.2d 612, 618 (1969) (quoting *Merrick v.*
17 *Stephens*, 337 S.W.2d 713, 719 (Mo.Ct.App.1960)).

18 An action to establish an equitable lien is an action in equity. *Chase Home Finance,*
19 *LLC v. Risher*, 405 S.C. 202, 746 S.E.2d 471 (Ct. App. 2013).

20 An equitable lien may be declared when one has furnished funds for the
21 improvement of the property of another, with the knowledge and consent of the
22 other, **OR** when one in good faith, and under a mistake as to the condition of the
23 title, makes improvements, renders services, or incurs expenses that are
permanently beneficial to another's property.

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25 53 C.J.S. Liens § 25 (emphasis added).
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1 Plaintiffs moved into their home at 881 N. Sunnyvale, Gilbert, AZ 85235
2 (Sunnyvale Property) in August of 2014. Complaint ¶3. The Sunnyvale Property required
3 \$34,559.66 in repairs. Complaint ¶6. Prior to filing the adversary complaint that is the
4 subject of this Motion, Plaintiffs spent \$19,526 toward improvements to the Sunnyvale
5 Property after amending the bankruptcy schedules and claiming the Sunnyvale Property
6 as exempt and their homestead. Complaint ¶¶ 3-5 and 7-8. There is equity in the
7 Sunnyvale Property and the improvements have increased its value. Complaint ¶ 11-13.
8 Plaintiffs had a good faith belief that they would prevail and be able to retain the home.
9 In fact, the Defendant agreed to settle the matter and cancelled the scheduled sale
10 (Administrative Case, 2:13-18751-EPB Doc. 86 and 89), which would have allowed
11 Plaintiffs to keep the home. However, Lund Cadillac, LLC (an alleged creditor) objected
12 to the exemption (2:13-18751-EPB Doc. 88; Complaint ¶¶ 9-10) and ignited all of the
13 litigation that led the parties to the 9th Circuit Court of Appeals. Although the 9th Circuit
14 ruled the home was not exempt, Plaintiff intends to file a Motion for Reconsideration
15 which is due January 12, 2018. The increase in the Sunnyvale Property's value is a direct
16 and permanent benefit to Defendant because part of the proceeds will go to compensate
17 Defendant, leaving Plaintiffs with nothing. Plaintiffs have presented facts, that if taken as
18 true, support their claim for an equitable lien. Defendant's Motion should be denied.
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20 **B. PLAINTIFFS HAVE PLEAD FACTS THAT SUPPORT A CLAIM FOR**
21 **UNJUST ENRICHMENT**

22 Under Arizona law "five elements must be proved to make a case of unjust
23 enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the
24 enrichment and the impoverishment; (4) absence of justification for the enrichment and
25 the impoverishment and (5) an absence of a remedy provided by law. *Cnty Guardian*
26 *Bank v. Hamilton*, 182 Ariz. 627,629; 898 P.2d 1005,1007 (App. 1995)(citing *City of*
27 *Sierra Vista v. Cochise Enter., Inc.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1131
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1 (App.1984); *Stapley v. American Bathtub Liners, Inc.*, 162 Ariz. 564, 568, 785 P.2d 84,
2 88 (App.1989). To create a community obligation from an unjust enrichment judgment,
3 the plaintiff, must plead and prove that the Defendant was enriched. Id.

4 Plaintiffs allege that the value of the property has been increased by an amount
5 equal to or more than the amount expended by the Plaintiffs. Complaint ¶12. Plaintiffs
6 have also alleged that by improving the property, as set forth above, the Defendant which
7 is the Chapter 7 Trustee, has been enriched. Complaint ¶¶3-13 and 15. Plaintiffs also
8 allege that they have been impoverished by investing funds to improve property that will
9 be sold if the homestead exemption is not allowed. Complaint ¶¶3-13 and 16. Plaintiffs
10 further allege that there is a connection between the enrichment and the impoverishment
11 in that the monies expended by Plaintiffs (the impoverishment) were and are a benefit to
12 the Defendant (the enrichment). Complaint ¶¶3-13 and 17. Plaintiffs also allege that there
13 is no justification for enrichment and impoverishment and that there is no adequate
14 remedy at law. Complaint ¶19. If the court takes all of the allegations in the complaint as
15 true, Plaintiffs have clearly been impoverished and the Defendant has been enriched. The
16 increased value of the Sunnyvale property, if sold by the Defendant, will go to the trustee
17 and Plaintiffs and their five children will be left with nothing. Plaintiffs have sufficiently
18 made a claim for unjust enrichment.

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20 **C. PLAINTIFF'S THIRD CAUSE OF ACTION SEEKING**
21 **ADMINISTRATIVE EXPENSES WAS VOLUNTARILY DISMISSED**
22 **BY PLAINTIFF**

23 Defendant's Motion, for the most part, is based on a claim that is no longer part of
24 the complaint. Plaintiffs moved to dismiss count three, a claim for administrative
25 expenses, on July 27, 2015, which was granted (Doc. 6 and 11). Plaintiffs do not now
26 make a claim for administrative expenses, but rather assert valid claims under Arizona
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1 law for an equitable lien and for unjust enrichment as set forth above in section A and B.
2 Therefore, Defendants arguments regarding the requirements of 11 U.S.C. § 503(b) do
3 not apply and are not a valid basis to dismiss the complaint. Defendant is simply
4 attempting to re-characterize the complaint to create a basis for dismissal. Defendant cites
5 *Vu v. Kendall (In re Vu)*, 245 B.R. 644, 647–48 (9th Cir.BAP2000)), to support its
6 argument that Plaintiffs’ claim for administrative expenses should fail. Motion p. 5 lines
7 19-20. However, Plaintiffs are not making a claim for administrative expenses and the
8 factors under *Vu* do not apply. *Vu* does not addresses whether a debtor can make a claim
9 for an equitable lien or unjust enrichment for necessary repairs made to property of the
10 bankruptcy estate, rather *Vu* involved the question of whether the debtor could compel
11 a 11 U.S.C. 554(b) abandonment of appreciated property. *Id.*

12 Defendants argue that the Trustee did not request “that any of these expenses be
13 incurred, and at no time did the Plaintiffs seek prior Court approval to incur the expenses
14 or make alterations to the Sunnyvale Property.” Those requirements do not apply here.
15 The repairs were immediately necessary to prevent waste and preserve the value of the
16 Sunnyvale property. Exhibit B and C (“Exhibits”) to Plaintiff’s complaint show the need
17 to replace the air conditioner, the water heater, and repair the plumbing. The Exhibits
18 also show the need to replace exhaust fans, smoke detectors and treat for termites.
19 Plaintiffs also had to make interior repairs and improvements as well as revive the
20 landscaping. With five small children in the home, the Plaintiffs could not live without
21 air conditioning in the summer time or without a hot water heater or with termites for that
22 matter. The expenditures for the repairs was urgent and Plaintiffs hoped that the
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1 homestead exemption would be allowed based on Arizona law and they would be able to
2 make a fresh start. Plaintiffs' actions benefited all parties. As outlined in the sections
3 above, Plaintiffs have made plausible claims for an equitable lien and unjust enrichment.
4 Defendant's Motion should be denied.
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7 **D. PLAINTIFFS SHOULD BE ENTITLED TO AMEND THIER**
8 **COMPLAINT IF NECESSARY**

9 Plaintiff respectfully requests that this court grant leave to amend the complaint
10 should the court find the complaint inadequate pursuant to Rule 15, Federal Rules of
11 Civil Procedure.
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14 **III. CONCLUSION**

15 Based on the foregoing, Plaintiffs respectfully requests that the Motion to Dismiss
16 be denied in its entirety, and that they be allowed to move forward on the merits of their
17 claims. In the event that any portion of the Motion is granted, Plaintiff requests leave to
18 amend.

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20 RESPECTFULLY SUBMITTED, this 5th day of January, 2018.
21

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ORIGINAL of the foregoing filed
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